

Public Defender of Indiana

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October 11, 2012

Mr. Adam Horst
Director, Office of Management and Budget
200 W. Washington Street, Room 212
Indianapolis, Indiana 46204

RE: Agency Overview
Public Defender of Indiana [BU00605]

Dear Mr. Horst:

AGENCY OVERVIEW

Reversions through FY 11-12:

In an effort to continue fiscal responsibility to the State of Indiana and its citizens, we have made the following reversions to the General Fund the last four (4) Fiscal Years: \$665,797 in FY 09; \$267,027 in FY 10; \$319,345 in FY 11 and \$377,190 in FY 12.

Mission:

The mission of the Public Defender of Indiana is: 1) to assure fundamental fairness in criminal and juvenile cases resulting in incarceration by providing factual and legal investigation in all capital cases and in juvenile and non-capital cases when sought by the indigent inmate, and representation at hearing and on appeal when the post-conviction action has arguable merit, at State expense; and 2) to locate competent counsel for trial and direct appeal at county expense, when the county court cannot provide counsel to represent the indigent defendant.

The Public Defender of Indiana constitutes an integral part of Indiana's system for guaranteeing the fairness of criminal proceedings resulting in loss of life or liberty. Indiana has a proud and long history of recognizing and respecting the right of any individual accused of a crime to the assistance of counsel. Indiana's Constitution explicitly establishes the right to counsel for the accused at trial and guarantees the right to appeal, with the assistance of counsel, in all criminal cases. Indiana afforded publicly paid counsel to those accused of crimes and financially unable to hire an attorney long before this was required by the United States Supreme Court, *Webb v. Baird*, 6 Ind. 13 (1854). Indiana was one of the first states in this nation to provide for review in criminal cases where no direct appeal was available, in *Sanders v. State*, 85 Ind. 318 (1883), where the accused pled guilty to avoid imminent lynching by a mob. Post-

conviction relief in Indiana is available to those who have pled guilty or who have appealed without being able to raise all challenges to their convictions or sentences on direct appeal. The Public Defender of Indiana represents all those sentenced to death who cannot hire counsel and investigates the cases of other indigent inmates who seek review, advising them as to the merit of their cases and litigating those with merit.

POST-CONVICTION RELIEF SERVICES IN NON-CAPITAL AND NON-LWOP (Life Without Parole) CASES:

Objectives for the 2013-2015 Biennium:

To continue to provide high quality representation to post-conviction petitioners, to improve efficiency in case review, and to meet these objectives while continuing to practice fiscal responsibility and restraint.

Accomplishments and Challenges

In FY 12 the Public Defender of Indiana evaluated more post-conviction cases (521) than any time in the last decade. The post-trial and appeal records waiting to be evaluated have also been reduced to 336 from a high of 503 in FY 01. The Public Defender of Indiana in FY 12 also closed 439 cases because of lack of merit, the highest since January 1991, when Ind. P-C.R. 1(9)(c) was amended to allow discretion in determining arguable merit in post-conviction cases. The Public Defender of Indiana also obtained relief in cases resulting in a reduction of 457.18 years of imprisonment in the Indiana Department of Correction for a net savings to the State of Indiana for \$4,692,267. This is in spite of receiving the highest number of *pro se* petitions (613) than any year since 2004.

The Public Defender of Indiana has had a very stable and experienced attorney staff over the past decade. Four attorneys have left the employment of the Public Defender of Indiana since FY 11, including agency head, Susan K. Carpenter, who retired on May 31, 2011. Those attorneys were replaced by two attorneys who had previously worked with the Public Defender of Indiana, an attorney who was a previous law clerk with the Public Defender of Indiana and an attorney who had experience with the Marion County Public Defender Agency. The main reason we have been able to maintain a stable staff is the attorney pay scale that was implemented in February, 1996. Before the pay scale, the Public Defender of Indiana experienced a great amount of turnover because of the lack of salary increases. The pay scale curbed that turnover. Unfortunately, because the CYE base for the 10-12 Biennium was reduced by \$500,000 at the request of the Governor and the 11-13 Biennium remained the same, the Public Defender of Indiana could no longer fund the pay scale. The prospect of losing experienced attorneys because of the absence of a pay scale is possible. (See attached Organizational Chart.)

In FY 92, we established performance standards to assure that non-capital attorneys meet minimum quantitative and timeliness standards. The performance standards provide short-term productivity guidelines to each deputy and, on a long-term basis, assist in reducing the backlog of unreviewed cases. Attorneys' caseloads are evaluated bi-monthly at two levels: amount of casework performed and movement of cases from review to resolution. Since implementation in

October, 1991, increases have been achieved in both the casework generated by deputies and the speed with which cases proceed toward resolution. Evaluation of work quality is accomplished through training and supervision and has not been affected by these performance standards; providing competent and high quality representation during post-conviction proceedings remains the primary goal of this agency.

Our assistance has proven the innocence and effectuated the release of one death-sentenced inmate and six others serving lengthy prison terms.¹ Post-conviction relief serves several different purposes, including correction of serious or fundamental error, prejudicial to the defendant's rights and to the system's fairness; exhaustion of state remedies, a prerequisite to seeking relief in federal habeas corpus; independent examination of the fairness of criminal proceedings in indigent cases, through a review and investigation by State Deputies Public Defender free of local control; and clarification and explanation of the merit, or lack of merit, in challenging the case to inmates often misinformed or uninformed about the criminal process. The significance of the last should not be ignored: this office frequently succeeds in explaining why a conviction and sentence are valid to an inmate whose overworked trial public defender did provide adequate representation but did not explain the process sufficiently. We believe that our educating function often succeeds with inmates whose misconceptions and feelings of having been treated unfairly cause great resentment. Often the removal of these perceived grievances makes a great difference in how an inmate serves his time and perhaps in his potential rehabilitation by removing the sense that the system mistreated him. Not all inmates are persuaded, of course.

Of 623 non-capital cases disposed in FY 06, 54 (8.67%) involved some relief being granted, either as a change in sentence, a vacation of conviction or sentence with or without a new trial, a new sentencing hearing, or a PCR hearing. (Cases where one or more concurrent sentences were vacated, with no change in aggregate sentence, are not counted.) Cases effecting

¹Charles Smith, sentenced to death in 1983, conviction and sentence affirmed on appeal in 1985, was granted a new trial by the Indiana Supreme Court in 1989 following presentation of significant evidence of innocence by this office in his post-conviction proceeding. The State chose not to seek the death penalty at his retrial, and the jury found him not guilty. Dwayne Scruggs was released in 1993 after spending eight years incarcerated for rape; this office located the original rape kit and paid for DNA testing which conclusively established that he was not guilty of the rape. Ray Smith served seventeen years for a murder he had not committed; after evidence was presented at his post-conviction relief hearing establishing he was misidentified, the conviction was vacated and the Prosecutor chose to dismiss the charges. Jacqueline and Roger Latta were convicted of felony murder based upon an arson theory; PCR evidence indicated no arson occurred. The Lattas served 11 years before the convictions were reversed in 2001. The State elected to not retry the cases. Richard Alexander served five years on sentences totaling 70 years for convictions involving two separate victims before investigation revealed the two victims were actually assaulted by two other men. Charges against Alexander were dismissed by the State after his agreed release following post-conviction investigation in early 2002. Chad Marcum served 12 years for a murder and an attempted murder he did not commit. He was granted a new trial in 2010 following presentation of significant evidence of innocence in post-conviction proceedings. Charges against Marcum were dismissed by the State resulting in his release.

reduction in years served involved improper or illegal conviction(s) and sentence(s) as determined by the trial court or appellate court or cases where the State of Indiana agreed to the relief or modification. The aggregate sentencing change in FY 06 cases equaled 245.13 actual years (490.25 sentencing years). In FY 07, 63 of 659 cases (9.56%) closed resulted in relief. The aggregate sentencing change in FY 07 cases equaled 325.5 actual years (649.09 sentencing years). In FY 08, of 626 non-capital cases disposed, 38 (6.07%) resulted in relief. The aggregate sentencing change in FY 08 cases equaled 228.385 actual years (456.77 sentencing years). In FY 09, of 600 non-capital cases disposed, 30 (5.0%) resulted in relief. The aggregate sentencing change in FY 09 cases equaled 270.61 actual years (541.21 sentencing years). In FY 10, of 614 non-capital cases disposed, 28 (4.5%) resulted in relief. The aggregate sentencing change in FY 10 cases equaled 156.22 actual years (312.43 sentencing years). In FY 11, of 604 non-capital cases disposed, 32 (5.3%) resulted in relief. The aggregate sentencing change in FY 11 cases equaled 127.02 actual years (255.04 sentencing years). In FY 12, of 669 non-capital cases disposed, 32 (4.8%) resulted in relief. The aggregate sentencing change in FY 12 cases equaled 457.18 actual years (228.59 sentencing years). Some cases involving retrials or new sentencings, and cases where PCR petitions were improperly denied without hearing and must have hearings, may ultimately result in some relief.

In FY 11, 418 (59.4% of 703 cases closed) were closed after deputies reviewed and investigated the case, advised the client his petition was not meritorious, and ceased representing the petitioner due to the case's lack of arguable merit. In FY 12, 439 (65.6% of 669 cases closed) were closed after deputies reviewed and investigated the case, advised the client his petition was not meritorious, and ceased representing the petitioner due to the case's lack of arguable merit. While some of these cases were doubtless litigated *pro se*, in many the trial and appellate courts, as well as prosecutors and the Attorney General, are spared the time and expense of their litigation as a result of our work and explanation of lack of merit to the client.

| | Total Disposed As No Merit |
|-----------------------|---------------------------------------|
| FY 91-92 | 234 |
| FY 92-93 | 205 |
| FY 93-94 | 171 |
| 7 to 12/94 (6 months) | 74 |
| CY 1995 | 147 |
| CY 1996 | 161 |
| CY 1997 | 183 |
| CY 1998 | 201 |
| CY 1999 | 240 |

| | |
|----------------------|--------------|
| 1/00-6/00 (6 months) | 125 |
| FY 2000-2001 | 255 |
| FY 2001-2002 | 325 |
| FY 2002-2003 | 294 |
| FY 2003-2004 | 400 |
| FY 2004-2005 | 372 |
| FY 2005-2006 | 392 |
| FY 2006-2007 | 386 |
| FY 2007-2008 | 338 |
| FY 2008-2009 | 348 |
| FY 2009-2010 | 367 |
| FY 2010-2011 | 418 |
| FY 2011-2012 | 439 |
| Total | 5,290 |

While any individual, whether or not incarcerated, retains the right to seek review of any non-capital conviction or sentence, this office no longer provides counsel unless success in challenging the case would result in a change in the inmate's custody and no longer provides representation at hearing and on appeal unless the case has arguable merit.

Although the Public Defender of Indiana has evaluated more cases in FY 12 than in the past decade, it remains challenged by a growing prison population. The population of the Indiana D.O.C. has more than tripled since 1981 (see below). Since 2000, PCR filings have sharply increased.

Department of Correction Population

| | |
|---------|---|
| 6/30/81 | 7,354 |
| 6/30/91 | 13,663 |
| 6/30/01 | 19,720 (including jail & contract beds) |
| 6/30/08 | 28,342 (including jail & contract beds) |
| 6/30/09 | 29,377 (including jail & contract beds) |

| | |
|---------|---|
| 6/30/10 | 29,278 (including jail & contract beds) |
| 6/30/11 | 28,729 (including jail & contract beds) |
| 7/1/12 | 28,911 (including jail & contract beds) |

Pro Se Petitions Received

| | |
|-----------|-----|
| CY 1996 | 322 |
| CY 1997 | 384 |
| CY 1998 | 334 |
| CY 1999 | 460 |
| 1/00-6/00 | 328 |
| FY 00-01 | 718 |
| FY 01-02 | 632 |
| FY 02-03 | 640 |
| FY 03-04 | 620 |
| FY 04-05 | 586 |
| FY 05-06 | 546 |
| FY 06-07 | 553 |
| FY 07-08 | 564 |
| FY 08-09 | 596 |
| FY 09-10 | 603 |
| FY 10-11 | 569 |
| FY 11-12 | 613 |

The most obvious explanation for the increase in filings is the impact of the federal 1996 Anti-Terrorism and Effective Death Penalty Act, which created a one-year statute of limitations to file a federal habeas corpus action. The one year period generally runs from finality on direct appeal or, if no appeal is taken, when the time for appeal expires, and is tolled while a properly filed state post-conviction petition remains pending. This federal legislation created a nationwide increase in filings as inmates realized they had to file a state action promptly or forever lose any possibility of filing a federal habeas corpus petition – only a state action can toll the time. The increase in filings began after 1996 and continues to date and although the number has stabilized there was an increase in FY 12.

We have conscientiously striven to reduce spending, making the following reversions to the General Fund:

| Year | Amount Reverted |
|-------------|------------------------|
| 00-01 | \$434,181 |
| 01-02 | \$669,825 |
| 02-03 | \$914,218 |
| 03-04 | \$451,703 |
| 04-05 | \$566,599 |
| 05-06 | \$434,197 |
| 06-07 | \$405,290 |
| 07-08 | \$645,420 |
| 08-09 | \$665,797 |
| 09-10 | \$276,915 |
| 10-11 | \$319,345 |
| 11-12 | \$377,190 |

These amounts were made possible by severe spending controls and by the reduced number of capital post-conviction cases. But, while capital post-conviction cases have declined as a result of fewer capital sentences being imposed, the incarceration rate has remained high: the Department of Correction held 28,911 adults and juveniles on July 1, 2012, compared with 15,807 adults and juveniles on June 30, 1994. As the D.O.C. population increases, in general so does our caseload; and the increased eligible population, along with changes in the rules for federal habeas corpus, has greatly increased the number of inmates whom we must represent under Post-Conviction Rule 1 and I.C.33-40-1-2(a).

| | Post-Trial Records Evaluated | Guilty Plea Records Evaluated | Total Evaluated |
|----------|---|--|------------------------|
| FY 00-01 | 209 | 167 | 376 |
| FY 01-02 | 236 | 219 | 455 |
| FY 02-03 | 243 | 191 | 434 |
| FY 03-04 | 267 | 184 | 451 |
| FY 04-05 | 223 | 229 | 452 |
| FY 05-06 | 245 | 213 | 458 |

| | | | |
|----------|-----|-----|-----|
| FY 06-07 | 249 | 198 | 447 |
| FY 07-08 | 217 | 197 | 414 |
| FY 08-09 | 186 | 168 | 354 |
| FY 09-10 | 224 | 213 | 437 |
| FY 10-11 | 229 | 247 | 476 |
| FY 11-12 | 243 | 278 | 521 |

Post-Trial and Appeal Records Waiting to Be Evaluated

| | |
|------|-----|
| 7/00 | 399 |
| 7/01 | 503 |
| 7/02 | 501 |
| 7/03 | 496 |
| 7/04 | 484 |
| 7/05 | 473 |
| 7/06 | 419 |
| 7/07 | 358 |
| 7/08 | 337 |
| 7/09 | 389 |
| 7/10 | 458 |
| 7/11 | 431 |
| 7/12 | 336 |

POST-CONVICTION RELIEF SERVICES IN CAPITAL AND LIFE WITHOUT PAROLE (LWOP) CASES:

Objectives for the 2013-2015 Biennium:

To continue to provide high quality representation to death and LWOP sentenced post-conviction relief petitioners in compliance with Indiana statutes and the Rules of the Indiana Supreme Court, to improve efficiency in case review, and to meet these objectives while continuing to practice fiscal responsibility and restraint.

Accomplishments and Challenges:

Five deputies are qualified to handle capital post-conviction cases where the death penalty was sought and might be charged again, and life without parole cases.

In FYs 94, 95, and 96, the number of evidentiary hearings and appeals in capital cases (handled in-house or by private counsel due to a conflict of interest) increased substantially. We began FY 95 with twenty-one open capital post-conviction relief cases. We began FY 99 with twenty open capital cases in-house and nine open conflict of interest capital cases handled by private counsel.

However, the rate of capital sentencing has declined; we had two new cases in FY 10. In FY 10, there were four open capital cases: two denials of relief on appeal (Kubsch & Baer), and two first petitions: one petition filed pending hearing (Ward), and one rehearing pending which was subsequently opened (Wilkes).

In FY 12, deputies were still involved with two capital cases. The denial of Roy Ward's petition was affirmed on June 21, 2012. Daniel Wilkes obtained partial relief in the post-conviction court; his death sentence was vacated and he was resentenced to life without parole. Other issues were fully briefed and oral argument was held on June 19, 2012, in the Indiana Supreme Court.

At the end of FY 12, the Indiana Supreme Court's docket had no capital cases on direct appeal. There are currently five capital cases still pending in the trial courts throughout the state (Adams, Gibson, Isom, Weisheit, Bell).

Those five deputies are also currently representing 17 clients serving life without parole sentences under I.C. 35-50-2-9. "Inasmuch as life without parole is the second most severe penalty permitted by law," *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991), representation in these cases tends to be considerably more time-consuming than in general felony cases. While death sentences have receded in recent years, sentences of life without parole continue to be imposed, perhaps at an increased rate.

Indiana statutes and Criminal Rule 24 require prompt filing, hearing, and appeal of capital post-conviction cases and have affected expenditures for conflict cases, for transcripts and hearings, experts, and in-State travel, hotel and subsistence. We have carefully analyzed past and current expenditures and made our best estimates, but we have no way of determining how rapidly cases will be decided on direct appeal, how many will involve conflicts requiring appointment of outside counsel, or how many prosecutions will result in new death sentences. Our biennium requests are our best estimate; costs for capital and non-capital conflict cases could be higher if unanticipated conflict cases arise.

The American Bar Association has issued comprehensive Guidelines for the Appointment and Performance of Defense Counsel With Death Penalty Cases. Guideline 10.15.1(C) sets forth the duties of post-conviction counsel:

Post-Conviction counsel should seek to litigate all issues, whether or not previously presented that are reasonably meritorious under the standards applicable to high quality capital defense and representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

We strive to comply with those Guidelines. State post-conviction proceedings are an increasingly critical phase in all criminal cases, but especially in capital cases, in light of recent United States Supreme Court decisions in habeas corpus cases. Failure to properly present the petitioner's case in State post-conviction proceedings can result in excessive delay, remands from federal court for further state proceedings, and successive petitions for relief. Appropriate funding levels reduce delay, expense, and the need for additional, expensive proceedings. Competent representation on the first post-conviction petition serves this State's interest in justice, finality and fairness.

Our challenge is to provide competent representation in capital cases to assure fair evaluation and review of Indiana death sentences.

Capital litigation requires tremendous effort and resources at all levels. Our expenses vary enormously based on the stage of capital litigation. We must have sufficient funds to insure competent representation in all cases, including capital cases. While we do not currently have any capital conflict cases, one could arise at any time, and it is also possible that a case may come back to state court from federal court.

**Post-Conviction (Capital and Non-Capital) Activity Summary
FY 10-11 and 11-12**

| | FY 10-11 | FY 11-12 |
|-------------------------------------|-----------------|-----------------|
| Evidentiary Hearings | 64 | 54 |
| Witness & Client Interviews | 1,342 | 1,324 |
| Juvenile Parole Revocation Hearings | 12 | 27 |
| Appellant's Briefs | 34 | 54 |
| Reply Briefs | 32 | 45 |
| Files Opened | 622 | 644 |
| Files Closed | 621 | 669 |

SERVICES TO COURTS:

As a service to trial courts throughout the State, the Public Defender of Indiana historically has either represented, by deputy, or located private counsel willing to represent indigent criminal defendants at trial or on appeal in cases where the county trial court finds no local attorney is reasonably available or the interests of justice require appointment of counsel not regularly practicing before the court, I.C. §33-40-2 *et seq.* The county bears the expense of providing counsel for indigent defendants in all criminal trials and appeals. Whether representation was provided by the Public Defender, or by counsel located by the Public Defender and accepted by the requesting court, the county is billed for services pursuant to the fee schedule established by the Supreme Court of Indiana.

Accomplishments and Challenges:

The Supreme Court and Court of Appeals have shortened the time within which briefs are due and decisions rendered; this, along with changes in the appellate rules, appears to have affected the number of attorneys interested in handling appeals of their own trials. Requests for trial level representation are less frequent. All cases, appellate and trial, are handled by outside counsel due to high caseloads in this office.

Objectives for the 2013-2015 Biennium:

Our goal for the 2013-15 Biennium is to continue to locate competent counsel to represent defendants at trial or on appeal at the request of trial court judges. We intend to continue to respond promptly to county trial courts' requests. This agency has been able to locate counsel acceptable to the appointing court in all cases. This task is often time-consuming as in many of these cases the defendant is unusually intractable and counsel is needed on short notice. Some appellate appointments are from small counties where few attorneys regularly engage in criminal appellate advocacy; others, and most trial appointments, involve multiple defendant conflicts of interest or difficult, litigious defendants and particularly high profile or heinous cases.

JUSTIFICATION/EXPLANATION OF OTHER OPERATING EXPENDITURES (.2-.9):

The Public Defender of Indiana does not request additional funds in points 2-9. However, the Public Defender of Indiana cannot sustain any fund reductions in points 2-9. The Public Defender of Indiana strives to continue its mission to provide competent representation to inmates who seek post-conviction relief and also continue to practice fiscal responsibility.

This agency provides legal representation pursuant to Post-Conviction Remedies Rule One and I.C. § 33-40-1 *et seq.* and the costs of representation are unlikely to decrease during FY 14 or FY 15. In order to do so competently and ethically, we must conduct appropriate legal and factual case investigation, including DNA and other scientific tests, and the retention of forensic and other experts, including the use of court-certified translators for non-English speaking clients. We must retain counsel outside the agency when a conflict of interest (due to prior representation by this office or conflicts of interest between clients entitled to

representation at our expense) precludes a staff attorney from handling the case. We represent clients in all Indiana counties and travel to these counties to investigate and litigate cases. We also provide essential services to Indiana's courts.

REQUEST FOR ADDITIONAL FUNDS IN .1

The Public Defender of Indiana is projecting actual salaries based upon an anticipated cost of living adjustment as approved by the Indiana Supreme Court. Since we do not participate in the Contingency Fund we must project increases pursuant to any COLA we will receive in .1 salaries. In January 2012 we received a 2.2% COLA approved by the Indiana Supreme Court that was not funded for in the FY 11-13 biennium. We were able to give that raise increase from the existing .1 fund and did not request a change package in that fund. If we are to receive a similar increase in FY 13, we will not be funded in .1 for that increase. Therefore, in FYs 14 and 15 we need additional funding to give any COLA approved by the Indiana Supreme Court. We project a 2.2% COLA in FYs 14 and 15 and therefore are projecting actual salaries based on potential 2.2% COLA in FY 13. If we do not receive additional funding for salaries, the Public Defender of Indiana will not be able to provide COLA to staff in FY 14 and FY 15. Therefore, we request a change above the base to \$6,847,449 (an additional \$183,768) in FY 14 and \$6,942,245 (an additional \$278,564) in FY 15.

SUMMARY

The Public Defender of Indiana is requesting additional appropriations in point 1 in order to fund any COLA that is approved by the Supreme Court of Indiana. The Public Defender of Indiana does not participate in the Contingency Fund; therefore, any COLA must come from its existing budget. The Public Defender of Indiana is not requesting additional appropriations in points 2-9 and will continue to pursue its mission of providing high quality representation to clients while practicing fiscal responsibility and restraint.

Respectfully submitted,

Stephen T. Owens
Public Defender of Indiana

STO/bwb